



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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Memorandum

Date: January 20, 2023

To: Richard Conescu, Chair, & Members, Zoning Board of Adjustment

From: Timothy J. Thompson, AICP, Community Development Director

Subject: **Governor's Hill Corp (petitioner/owner)** - Appeal from an Administrative Decision issued on December 13, 2022 that determined a rock retaining wall that is over 4' in height is considered a structure and is subject to setback requirements. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-04.

The following information is provided to aid in your consideration of the above referenced case. Additional background and application materials are included in your packet.

Background & Project Description

If the Board has already granted either the variance in Case 2023-02 or the Equitable Waiver in Case 2023-05, then this petition is unnecessary and should be either withdrawn by the petitioner or deemed moot by the Board.

Map 6D, Lot 104 is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. The lot is approximately 0.637 acres and is serviced by municipal water (MVD) and a private septic system. The lot is surrounded by residential uses and also abuts Reeds Ferry Elementary School.

Subject of Petitioner's Appeal

The petitioner is challenging staff's determination that the retaining wall constructed on the site (the wall is, at its tallest point shown on the certified plot plan, 18.3 feet in height) is subject to the setback requirements of Section 3.05 of the ordinance.

The petitioner's argument in the submitted materials references 2 definitions for setbacks in the ordinance, and argues that the wall should not be subject to those requirements.

Staff has consistently interpreted the ordinance to include any retaining wall of greater than 4' in height to be a structure (per the definition of structure in the ordinance and the structural requirements for retaining walls above 4' in height in the Building Code). Staff's position is simply that because the wall above 4' are considered a structure, it is subject to the property's structural setback requirements.

Standard of Review:

Pursuant to RSA 676:5, appeals may be taken by any person aggrieved by any decision of an administrative officer involving construction, interpretation or application of the terms of the ordinance. Under RSA 674:33 (I)(a), the Zoning Board of Adjustment has the power to, among other things, hear and decide appeals if it is alleged that there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16.

Staff wants to remind the Board that an Appeal of Administrative Decision is the only type of petition for which the Board sets a precedent. Unlike a variance or special exception (which is a decision based only on the particulars of the individual parcel of land), overturning an administrative decision requires staff to modify, moving forward, how the particular section of the ordinance is interpreted across all applicable parcels in the community.

- Should the Board have already voted to grant the variance in Case 2023-02 or the Equitable Waiver in Case 2023-05, this Appeal of Administrative Decision should be withdrawn by the petitioner. If not withdrawn, it must be determined to be moot, and no further action is necessary by the Zoning Board of Adjustment because the petitioner will have already obtained the relief required.
- Should the Board have already voted to deny both the variance in Case 2023-02 and the Equitable Waiver in Case 2023-05, then the Board would need to vote on this appeal:
 - Should the Board vote to grant the Administrative Appeal (and overturn the Community Development Staff's determination), the petitioner would be able to have the retaining wall remain in the required setback. ***If this is the decision made, the Zoning Board would require that staff allow for all walls, regardless of height, be permitted within the structural setbacks without relief from the dimensional requirements of the Zoning Ordinance in any instance.***
 - Should the Board vote to deny the Administrative Appeal (and uphold the Community Development Staff's determination), the petitioner's wall would be in violation, and the design would need to be revised to comply with the setback requirements, or the wall modified to be less than 4' in height and therefore not considered a structure subject to setback requirements (*again, this is assuming that this petition even is heard by the Board, which would only be the case if both the variance or Equitable Waiver are denied*).

Ec: Governor's Hill Corp., petitioner
 Eli Leino, Bernstein Shur
 Building Department Staff
 Fire Prevention Staff
 Assessing Department Staff
 Cc: Zoning Board File